DMCD MUSEUM ASSOCIATES SENDIRIAN *a*

v.

SHADEMAKER (M) SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR *b*
RK NATHAN J
[ORIGINATING SUMMONS NO: S2-24-426-1997]
27 JULY 1998

CIVIL PROCEDURE: *Affidavits - Filing of affidavits under O. 14 application - Whether leave of court necessary - Rules of the High Court 1980, O. 32* *c*

CIVIL PROCEDURE: *Summary judgment - Whether application for summary judgment nullity as claim was not pleaded in defence or counterclaim*

CIVIL PROCEDURE: *Pleadings - Defence and counterclaim - Amendment of - Amendment pending appeal to judge in chambers - Whether such pleadings can be amended - Whether consent of the other party affected legality of such amendment* *d*

CONTRACT: *Terms - Whether plaintiff could set-off against loss and damage - Pre-requisites before the plaintiff could exercise right to set-off* *e*

CONTRACT: *Terms - Condition precedent - Whether condition precedent for performance bond to be deposited - Whether such condition waived by conduct of party*

The plaintiff was engaged by KLCC Bhd to design, build and complete the Petronas Discovery Centre in the KL Twin Towers. The defendant was appointed by the plaintiff as the sub-contractor for certain works comprised in the main contract. The plaintiff sued the defendant for various defaults of its obligations under the sub-contract and claimed various injunctive reliefs and damages amounting to USD6,262,474 and RM5,205,081 after terminating the contract. The defendant having filed a defence, counterclaimed for wrongful termination and special damages amounting to RM4,183,231 and general damages. *f* *g*

This was an appeal by the defendant against the dismissal of its application for summary judgment by the deputy registrar in respect of payments due to the defendant under certain valuation certificates for the amount of RM384,485. The defendant filed and served a memorandum of appeal to the judge in chambers. Subsequent to this the defendant filed an application for leave to amend the defence and counterclaim for summary judgment which was the subject of this appeal. *h* *i*

The preliminary issues for consideration were: (a) whether the defendant could amend the defence and counterclaim pending appeal; (b) whether an affidavit filed by one of the directors of the defendant could be filed without the leave of the court; and (c) whether the application for an O. 14 was a nullity as the claim was not pleaded in the defence or counterclaim.

On the appeal itself, the issues for consideration were: (a) whether the plaintiff had a right to set-off against loss and damage; (b) whether the defendant was required to deposit a performance bond as a condition precedent to any payment to the defendant under the sub-contract; and (c) whether pursuance of this appeal and an order for summary judgment would amount to making a variation of an order of this court, dated 23 July 1997 for the plaintiff to deposit the sum of RM384,485.

Held:

[1] When a particular step in proceedings is open to a party at the outset and that party fails to take advantage of such step and allows the other party to act in a manner to its advantage, the first party cannot in any subsequent proceedings at the same trial, raise the issue which he ought to have raised at the first instance.

[1a] In this case, having consented to the amendment, the plaintiff could not now say that the defendant ought not to have amended the defence and counterclaim when the appeal to the judge in chambers was pending.

[2] Order 32 r. 13(2) of the Rules of the High Court 1980 applies to affidavits filed under O. 14 proceedings – which means that a party wishing to reply to an affidavit served on him must file his affidavit and serve it on the other party within 14 days from the date on which the affidavit he intends to reply was served on him. The rule does not require any leave of court.

[3] As the amount in the application for summary judgment was not pleaded in the defence or counterclaim, the deputy registrar had rejected the application. However, since the defendant had applied to amend the defence and counterclaim, the pleadings prior to the amendment were to be disregarded and ought not to be relied on for the determination of the issues at the trial. Moreover, since the plaintiff had consented to the amendment, there was no room for illegality or nullity.

[4] There was clearly an express provision for the plaintiff to set-off against loss and damage. However, before the plaintiff could claim a set-off, it ought to give the defendant prior notice in writing of its intention to set-off the amount quantified and grounds upon which such set-off was claimed. There was no such notice exhibited. In any case, the plaintiff had failed to depose in its affidavit its right to a set-off.

[5] The requirement of the performance bond had been waived because the plaintiff had allowed the defendant to commence work despite the latter's failure to deposit the performance bond. It was therefore not a condition precedent as the plaintiff had never prevented the defendant from proceeding with the contractual works.

[6] The order dated 23 July 1997 did not include an order for stay of proceedings in respect of the sum of RM384,485. The O. 14 application put an end to that part of the claim – therefore there was no variation of the order dated 23 July 1997.

[Appeal allowed.]

Cases referred to:

Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd [1998] 2 CLJ 75 ***(dist)***

Bandar Raya Developments Bhd v. Woon Hoe Kan & Sons Sdn Bhd [1972] 1 MLJ 75 ***(not foll)***

BBMB Kewangan Berhad v. Attan Abu Bakar [1996] 1 MLJ 709 ***(not foll)***

Pan-Electric Appliances (Pte) Ltd v. Electrical and Allied Industries Bhd [1988] 2 CLJ 473 ***(foll)***

PB Securities Sdn Bhd v. Abdul Rashid Mohamed [1994] 3 CLJ 209 ***(not foll)***

Pembenaan Leow Tuck Chui v. Dr Leela's Medical Centre Sdn Bhd [1995] 2 CLJ 345 ***(foll)***

Perbadanan Nasional Insurans Sdn Bhd v. Pua Lai Ong [1996] 3 CLJ 321 ***(foll)***

Seloga Jaya Sdn Bhd v. Pembenaan Keng Ting (Sabah) Sdn Bhd [1994] 2 CLJ 716 ***(refd)***

United Overseas Bank Ltd v. Heap Huat Rubber Co Sdn Bhd [1993] 3 CLJ 552 ***(refd)***

Utama Wardley Bhd & Anor v. Lenggang Laut Development Sdn Bhd & Ors [1991] 3 CLJ 2233 ***(refd)***

Legislation referred to:

Rules of the High Court 1980, O. 14 r. 2(3), O. 20, O. 32 r. 13(2)(b)

For the appellant - SS Tieh; M/s Paul Ong & Assoc
For the respondent - CW Teo (BY Goh with him); M/s Khaw & Hussein

Reported by Mariette Peters-Goh

JUDGMENT

RK Nathan J:

Facts

Kuala Lumpur City Centre Bhd engaged the plaintiff by contract dated 13 December 1996, to design, build and complete a Petronas Discovery Centre (Petrosains) in the Kuala Lumpur Twin Towers. The defendant was appointed by the plaintiff after an open competitive tender exercise, as the sub-contractor for certain works comprised in the main contract and more particularly described in a letter of award dated 5 February 1997, for a total consideration of RM25,721,508.18.

The letter of award provided, *inter alia*:

(a) that the defendant would be required to execute a formal sub-contract agreement, and pending such execution the defendant's tender submission together with the letter of award would constitute a binding contract between the defendant and the plaintiff; and

(b) that until the signing of the sub-contract document between Shademaker and the plaintiff, the letter of award and the tender submissions shall constitute a binding contract between the parties.

Following the issuance of the letter of award, the plaintiff compiled a set of the contract documents constituting the letter of award, all the documents in the tender submissions including the articles of agreement together with the conditions of sub-contract.

The Plaintiff's Case

The plaintiff sued the defendant for various defaults by the defendant of its obligations under the sub-contract and claimed various injunctive reliefs and damages amounting to US$6,262,474 and RM5,205,081 after terminating the contract.

Case For The Defence

The defendant having filed a defence counterclaimed for wrongful termination special damages amounting to RM4,183,231.95 and general damages.

The Application

This is an appeal by the defendant against the dismissal of its application for summary judgment by the learned deputy registrar in respect of payments due to the defendant under interim valuation certificates nos. 1, 2 and 3 for the amount of RM384,485.21. The defendant filed and served a notice of appeal

to judge in chambers. Subsequent to this the defendant filed, together with a certificate of urgency, an application for leave to amend the defence and counterclaim for summary judgment which was the subject of appeal. I granted an order in terms of this application on 26 February 1998 since there was no objection from the plaintiff. A copy of the duly endorsed amended defence and counterclaim was served on the plaintiff's solicitors.

Can The Defendant Amend The Defence And Counterclaim When Appeal Pending?

The plaintiff raised this as a preliminary issue before me and argued that it was improper for the defendant to amend its defence and counterclaim after the hearing of the application for summary judgment before the learned deputy registrar whilst an appeal against that decision of the learned deputy registrar was pending before a judge in chambers.

In *Utama Wardley Bhd & Anor v. Lenggang Laut Development Sdn Bhd & Ors* [1991] 3 CLJ 2233; [1991] 3 MLJ 490 there were two matters filed by the defendant. The first was a notice of appeal to set aside an O. 14 judgment and the other was an application to amend the defence, after judgment was granted, so as to adduce further and fresh evidence at the hearing of the appeal, by the admission of an affidavit. Siti Norma Yaakob J (as she then was) held that this approach did not affect the appeal as the right to amend by pleadings under O. 20 of the Rules of the High Court 1980 (the RHC) can be made at any stage of the proceedings provided no injustice is done to the other parties to the proceedings. She held that the discretion of the court ought to be exercised judicially. It is unfortunate that the case of *Pan-Electric Appliances (Pte) Ltd v. Electrical and Allied Industries Bhd* [1988] 2 CLJ 473 was not referred to her Ladyship in *Utama Wardley*. The facts in *Pan-Electric* were very succinctly stated by Dr. Zakaria Yatim J (as he then was) at p. 474:

> On January 14, 1984, the plaintiffs filed an application for summary judgment under O. 14 of the Rules of the High Court 1980. The plaintiffs' application was dismissed by the registrar on May 23, 1985.
>
> On January 28, 1985, the plaintiffs filed an application to amend the statement of claim. Leave to amend was granted by the registrar and the amended statement of claim was filed on February 27, 1985. In the amended statement of claim, the plaintiffs averred that the defendants owed them a sum of S$166,350.07¢ not only for the price of goods sold and delivered, but also for services rendered by the plaintiffs to the defendants at the defendants' request.

His Lordship held that it was not improper for the plaintiff to amend the statement of claim after the hearing before the registrar. Holding that the plaintiffs were entitled to amend their statement of claim any time before the close of pleadings, he held that the fact that there was an appeal pending could not prevent the said application from being made. He further held that since the appeal was argued before him by way of rehearing, he was treating the matter as if it had come for hearing for the first time.

In *United Overseas Bank Ltd v. Heap Huat Rubber Co Sdn Bhd* [1993] 2 AMR 2250 James Foong J followed the decision in *Pan-Electric* and held that as the judge would be determining the issues afresh, the application for amendment should be allowed.

The plaintiff submits that I ought not to follow the decision in *Pan-Electric* as the same was decided erroneously. The plaintiff referred me to *Seloga Jaya Sdn Bhd v. Pembenaan Keng Ting (Sabah) Sdn Bhd* [1994] 2 CLJ 716; [1994] 2 MLJ 97 and submitted that based on this authority a 'rehearing' of an appeal against a registrar's decision to a judge in chambers merely allows the parties to raise at the hearing of the appeal, issues not previously raised, but which could have been raised at the hearing before the registrar, and such issues must be confined to those facts which existed at the time of the hearing before the registrar either in the affidavits filed in support of the application or otherwise. With respect, such a narrow interpretation given by the plaintiff to the decision in *Seloga* does not give it the merit it deserves. All that the Federal Court decided was that the matter when it comes before the judge on appeal, must take the form of a rehearing. In so far as the registrar's decision is concerned, the judge will give it the due weight it deserves but the judge continues to exercise his own discretion as though the matter has come before him for the first time, and he is totally unfettered by the discretion exercised by the registrar.

In this case the defendant applied to amend the defence and counterclaim to suit the reason given by the deputy registrar for dismissing the O. 14 application. The plaintiff not only did not object to this application but even consented to it. Surely it was open to the plaintiff to have argued at that stage that if the amendment was allowed it would have rendered nugatory its opposition to the appeal before the judge in chambers. It is my judgment that when a particular step in proceedings is open to a party at the very outset and if that party fails to take advantage of that step and allows the other party to act in a manner to its advantage, the first party cannot in any subsequent proceedings at the same trial, raise the issue which he ought to have raised at the first instance. In this case the plaintiff surely ought to have known the reason for the application to amend and with the appeal before the judge still pending, the plaintiff ought to have been put to notice.

Having consented to the amendment the plaintiff cannot now say that the defendant ought not to have amended the defence and counterclaim when the appeal to the judge in chambers was pending.

Before the deputy registrar the plaintiff raised three issues which were again raised before me.

Whether Encl. 27 Could Be Filed Without Leave Of Court?

Enclosure 27 was an affidavit filed by one Tan Hock Kiong, a director of the defendant. This affidavit was filed in response to encl. 25 which was the plaintiff's affidavit. Enclosure 27 was filed and served within 14 days from the date of service of encl. 25. The defendant therefore contended that it had complied with the requirement of O. 32 r. 13(2)(b) of the RHC which states that 'a party wishing to reply to an affidavit served on him must file his affidavit and serve it on the other party within 14 days from the date on which the affidavit he intends to reply was served on him'. The defendant pointed out that the said rule does not require any leave of court save and except that the only requirement was that the affidavit be served within the 14 days.

The plaintiff on the other hand continued to rely on *PB Securities Sdn Bhd v. Abdul Rashid bin Mohamed* [1994] 3 CLJ 209; [1994] 3 MLJ 168 which concluded that the filing of affidavits in respect of O. 14 applications must be governed by the rules pursuant to O. 14 and not O. 32 r. 13(2)(b) of the RHC. I had in *BBMB Kewangan Berhad v. Attan bin Abu Bakar* [1996] 1 MLJ 709 held that O. 32 r. 13(2) of the RHC is a general provision that only applies to affidavits used in summons in chambers unless otherwise provided in the RHC. Due to the existence of special provision, namely O. 14 r. 2(3), the provision in O. 32 r. 13(2) of the RHC does not apply to O. 14 proceedings or to affidavits filed under it. My decision was in line with the decision in *PB Securities*.

Notwithstanding my view I am bound by the decision of the Court of Appeal in *Perbadanan Nasional Insurans Sdn Bhd (Dahulunya dikenali sebagai Union Insurance Malaysia Sdn Bhd) v. Pua Lai Ong* [1996] 3 CLJ 321 which overruled the decision in *BP Securities.* Although unfortunately my decision in *BBMB Kewangan* was not cited to the Court of Appeal, I accept the ruling of the Court of Appeal. In the circumstances, this objection of the plaintiff must fail.

Is Application For O. 14 A Nullity As The Claim Therein Not Pleaded In Defence Nor In The Counterclaim?

The plaintiff contends that since the defence and counterclaim dated 27 October 1997 in the form as it then was did not refer to the claim for the sums under the interim certificates nos. 1, 2 and 3 the summons in chambers dated 21 November 1997 (encl. 23) applying for summary judgment for such sums must be bad in law and therefore necessarily a nullity. In fact it was submitted that this was a ground on which the learned deputy registrar dismissed the application for summary judgment. The plaintiff submits that since the application was a nullity such an application cannot therefore be cured by a subsequent amendment to the defence and counterclaim. In support the plaintiff relied on the Federal Court decision in *Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd* [1998] 2 CLJ 75. To my mind, the reliance on this case is not in line. In *Badiaddin* the Federal Court had to deal with a question as to whether one High Court can set aside the order of another High Court irrespective of any illegality in the order. In allowing the appeal the Federal Court held that since the order sought to be set aside was obtained in violation of an express statutory prohibition it followed that the High Court had the jurisdiction to set aside the illegal order on the basis of *ex debito justitiae.*

I cannot by any stretch of the imagination hold that there was anything illegal in the application for summary judgment in this case. The application for summary judgment for part of a sum only amounting to RM384,485.21 was premised on the existence of three interim valuation certificates. However, these were not referred to in the application. On this, quite correctly the learned deputy registrar rejected the application. Knowing where its fault lay the defendant, as soon as it had filed an appeal, promptly applied to amend the defence and counterclaim to remedy this omission. The plaintiff too consented. Having obtained the order to amend and having served the same on the plaintiff what is before me now is an application for summary judgment premised on an amended defence and counterclaim with the relevant three interim certificates referred to therein. It must be the law that as soon as pleadings are amended, those pleadings prior to the amendment are to be disregarded and ought not to be relied on for the determination of the issues at trial. In this case the plaintiff has also consented to the amendment. There is no room for illegality or nullity.

The Application Itself

The Appeal

Based on the letter of award and the terms stated therein both parties are *ad idem* as to the actual contractual documents governing the obligation of the parties. It is common ground that the formal contract documents were never executed at any time.

It is also common ground that in view of the amount of work carried out, the defendant was issued three interim valuation certificates, namely certificates 1, 2 and 3. It is pertinent and relevant to note that not only were these three certificates approved by the plaintiff's quantity surveyor but also by the plaintiff itself (see exh. THK-7 to encl. 22). On this alone the defendant ought to be entitled to summary judgment. In *Bandar Raya Developments Bhd v. Woon Hoe Kan & Sons Sdn Bhd* [1972] 1 MLJ 75 the appellants appealed against the order granting leave to the respondents to sign final judgment, being the sum due under two contracts, and duly certified by the engineer in respect of certain civil engineering works. The appellants had sought to set off and counterclaim against the respondents in respect of damage, loss and expense suffered. Ong Hock Sim FJ in delivering the judgment of the court said at p. 76:

> We would also refer to the recent Court of Appeal decision in England reported in the Times of the 21st October, 1971 in the case of *Frederick Mark Ltd. v. Schild* ((London) Times October 21, 1971). The Court of Appeal in that case referred to *Dawnay's* case and categorically stated that the court agreed with every word Lord Denning said. This was to the effect that the purpose of interim certificates was to see that payments made under them were without any correlative right to set off or counterclaim as that would run counter to the very purpose of interim certificates – to provide cash for the contractor or sub-contractor to get on with the work. A debt due under an interim certificate was a debt of a class which ought not to be allowed to be made the subject of a set off or counterclaim.

However, the Federal Court in *Pembenaan Leow Tuck Chui v. Dr. Leela's Medical Centre Sdn Bhd* [1995] 2 CLJ 345; [1995] 2 MLJ 57 held that there was a common law right of set-off in building contracts that may be removed by express words or by implication. It is unfortunate that the decision in the *Bandar Raya Developments Bhd* was not referred to the Federal Court in *Pembenaan Leow Tuck Chui.* Notwithstanding this it seems more reasonable that if parties have agreed to accept permitted set-offs in the contract then it would be a harsh law that would say, as was held in *Bandar Raya Developments Bhd*, that there ought to be no room for a set-off or counterclaim in respect of interim certificates. In *Pembenaan Leow Tuck Chui* the Federal

Court held that although there were seven express provisions in the contract whereby the employer had the right of set-off none of them was relevant to the set-off that was contended. In the circumstances applying the *expressio unius* principle, the court held that the common law right of set-off had been extinguished, not expressly but by clear implication.

In this particular case cl. 29.1 of the sub-contract states as follows:

> Clause 29.1: In addition to any other rights at law or under the Sub-Contract, the Main Contractor shall notwithstanding anything contained in the Sub-Contract be entitled to deduct from or set-off against any money due from him to the Sub-Contractor any sum or sums which the Sub-Contractor is liable to pay to the Main Contractor under the Sub-Contract provided that the amount of such set-off has been quantified with reasonable accuracy by the Main Contractor and that the Main Contractor has given to the Sub-Contractor prior notice in writing of his intention to set-off the amount quantified and the grounds upon which such set-off is claimed to be made.

In the circumstances there is clearly an express provision for set-off by the plaintiff against the loss and damage in the sum of US$6,262,474 and RM5,205,081. I also find that the plaintiff has indeed quantified the said two sums with reasonable accuracy as required by cl. 29.1. However, there is one requirement to be fulfilled by the plaintiff before it claims a right to set-off. It ought to give the defendant prior notice in writing of its intention to set off the amount quantified and the grounds upon which such set-off is claimed. There has been no such notice exhibited. In any case the plaintiff has even failed to depose in its affidavit its right to a set-off. In the circumstances, I reject the plaintiff's claim to a set-off.

The plaintiff referred to cls. 20.1 and 20.6 of the conditions of sub-contract by which the defendant was required to deposit a performance bond which it contended was a condition precedent to any payment to the defendant under the sub-contract. The plaintiff submitted that despite repeated reminders from the plaintiff before and after commencement of sub-contract works, to deposit the performance bond, the defendant had failed to do so and therefore the plaintiff was not obliged to pay upon the interim certificates.

As for the non-depositing of the performance bond I hold that the said requirement has been waived by the plaintiff because what the plaintiff ought to have done was to insist on the depositing of the said performance bond before allowing the defendant to commence work on the site. At least the plaintiff ought not to have given possession of the site to the defendant. In any event it is my judgment that the depositing of the performance bond is no longer a condition precedent to entitlement for payments under the said three interim certificates because it has never been denied that the plaintiff had never prevented the defendant from proceeding with the contractual works despite the fact that the said performance bond had not been deposited.

Order Made To Deposit The Sum Of RM384,485.21 In An Interest Bearing Account

The plaintiff contends that since I had on 23 July 1997 made an order to deposit the sum of RM384,485.21 being the total sum claimed under the three interim certificates into an interest bearing account, the order effectually deprives the plaintiff the right to use this sum in the interim until the disposal of the action proper. It was submitted that the pursuance of this appeal and the order for summary judgment would be tantamount to making a variation order. It was urged upon me that such a variation order could only be made if the defendant can show that there is a change of circumstance since the granting of the order on 23 July 1997. Since no such evidence was adduced I was urged to dismiss the appeal.

The short answer to this is that my order dated 23 July 1997 did not include an order for stay of proceedings in respect of the said sum of RM384,485.21. The learned deputy registrar dismissed this argument. In my judgment, she was correct in doing so. This O. 14 application in fact puts an end to this part of the claim. In that respect there is no variation of my earlier order. This submission must fail yet again.

I therefore allow this appeal with costs.